Neutral Citation Number: [2023] EWHC 740 (Admin)

Case No: CO/3534/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2023

Before :

MR JUSTICE LAVENDER

- -

Between :

THE KING on the application of DM	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES	**Intervener**

- -
- -

Raza Husain KC, **Jason Pobjoy** and **Eleanor Mitchell** (instructed by **Duncan Lewis**) for the **Claimant**
Sonali Naik KC, **Rebecca Chapman** and **Ali Bandegani** (instructed by **Baker & McKenzie LLP**) for the **Intervener**
Lisa Giovannetti KC and **Hafsah Masood** (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 15 and 16 June 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

MR JUSTICE LAVENDER

Mr Justice Lavender:

(1) Introduction

1. The claimant is an Eritrean national who was born on 10 October 2002. Although he is now an adult, he was a child when he left Eritrea in around March 2014, when he arrived in the United Kingdom on 7 May 2017, when he was granted refugee status on 9 November 2018, when his parents and five younger siblings applied on 8 September 2020 for entry clearance so as to be reunited with him in the United Kingdom and when his claim form was issued on 30 September 2020.

2. Entry clearance was refused by the Secretary of State on 4 June 2021, but on 10 March 2022 a First-tier Tribunal judge allowed the appeals by the claimant's parents and siblings. Accordingly, the claimant no longer pursues his application for judicial review of the Secretary of State's decisions to refuse entry clearance.

3. However, the claimant continues to apply for judicial review of what is said to be the Secretary of State's "ongoing decision that parents and siblings of refugee children will not be entitled to family reunion on the same basis as the spouses and children of adult refugees under the Immigration Rules". He seeks a declaration that the Secretary of State has acted unlawfully in three respects:

   (1) He contends that the Secretary of State has failed to comply with her duty ("the section 55 duty") under section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act").

   (2) He contends that the Immigration Rules discriminate unjustifiably against refugees who are children, contrary to Articles 14 and 8 ECHR.

   (3) He contends that the decision is irrational.

4. The claimant's application was stayed by order of Farbey J on 28 October 2020 pending the outcome of a similar application in a case in which permission to apply for judicial review was subsequently refused on the papers by Farbey J on 15 December 2020 and by Chamberlain J on 9 February 2021 after a hearing: *JS v Secretary of State for the Home Department* [2021] EWHC 234 (Admin) (*"JS"*). Following the lifting of the stay on 23 September 2021 by order of Linden J and the amendment of the claim form and the statement of facts and grounds, on 7 December 2021 Bourne J refused permission to apply for judicial review on the papers, but Cotter J granted permission at a hearing on 22 February 2022.

5. The application for judicial review is supported by the United Nations High Commissioner for Refugees ("the UNHCR"), who was granted permission to intervene by order of 6 June 2022.

6. The application is resisted by the Secretary of State, who also asserts that the claimant lacks standing to bring the application, given that the First-tier Tribunal has now allowed the appeals against the Secretary of State's dismissal of the applications made by the claimant's parents and siblings. Although she resisted the application, the Secretary of State did not serve any evidence in advance of the hearing. I will deal later with the evidence served after the hearing.

(2) The Relevant Immigration Rules

7. The relevant rules are paragraphs 352A to 352G in Part 11 of the Immigration Rules, together with paragraph 277. In summary:

(1) in the case of refugees who are adults, the Immigration Rules provide that, subject to certain conditions, their partners and minor children may obtain leave to enter the United Kingdom for the purposes of family reunion; but

(2) in the case of refugees who are children, there is no provision in the Immigration Rules for their parents or minor siblings to obtain leave to enter the United Kingdom for the purposes of family reunion, with the result that those parents or siblings have to apply for leave to enter outside the Immigration Rules.

(2)(a) Background

8. It is perhaps worth stressing at the outset that this case is concerned with children who have been found to be refugees, i.e. children who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their nationality or former habitual residence and are unable or, owing to such fear, are unwilling to avail themselves of the protection of that country. The number of children who apply for asylum in this country has grown considerably in recent years. I was not provided with figures, but I note the statistics set out in paragraph 104 of Saini J's judgment in *R (MK) v Secretary of State for the Home Department* [2020] 4 WLR 37 (*"MK"*), according to which the number of asylum applications made by unaccompanied children was 1,265 in 2013 and rose to 3,496 in 2019. According to the UNHCR, 3,112 unaccompanied children were granted refugee status in the last two years.

9. Mr Husain was at pains to stress that the claimant was not inviting me to adjudicate on the United Kingdom's compliance with its international obligations. I will refer to certain international material merely by way of context. I note, however, that neither the 1951 Refugee Convention nor the 1967 Protocol provide for refugees to have a right to family reunion. As Sales LJ said in paragraph 13 of his judgment in *Mosira v Secretary of State for the Home Department* [2017] EWCA Civ 407:

> "The Refugee Convention does not impose an obligation on Contracting States to grant leave to enter or leave to remain in order to achieve family reunion with a sponsor who has been granted refugee status in the host state, but the UN Human Rights Committee exhorts Contracting States to do this."

10. On 25 July 1951 the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons contained the following recommendation:

> "THE CONFERENCE,
>
> CONSIDERING that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and

NOTING with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p. 40), the rights granted to a refugee are extended to members of his family

RECOMMENDS Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

11. In July 1983 the UNHCR published the UNHCR Guidelines on Reunification of Refugee Families ("the UNHCR Guidelines"), paragraph 5 of which states as follows:

"In accordance with the principles referred to above, the following types of family reunification should receive the support of UNHCR:

(a) Reunification of the "nuclear family", consisting of husband and wife and their dependent children. There is a virtually universal consensus in the international community concerning the need to reunite members of this family nucleus. The following points should be noted in this connection:

(i) **Husband and wife.** Besides legally married spouses, couples who are actually engaged to be married, who have entered into a customary marriage, or who have lived together as husband and wife for a substantial period can be considered eligible for UNHCR assistance. The same applies in principle to spouses in a polygamous marriage if it was validly contracted in the country of origin. On the other hand, estranged spouses who do not intend to live as a family unit in the country of asylum are not normally eligible for UNHCR assistance for reunification with each other, they may however qualify for reunification with their children.

(ii) **Parents and children.** Although some countries of asylum make a distinction between minor children and those who have come of age, it is UNHCR policy to promote the reunification of parents with at least those dependent, unmarried children, regardless of age, who were living with the parents in the country of origin.

(iii) **Reunification of unaccompanied minor children with their parents and siblings.** An unaccompanied minor child should be reunited as promptly as possible with his or her parents or guardians as well as with siblings. If the minor has arrived first in a country of asylum, the principle of family unity requires that the minor's next-of-kin be allowed to join the minor in that country unless it is reasonable under the circumstances for the minor to join them in another country. Because of the special needs of children for a stable family environment, the reunification of unaccompanied minors with their families, whenever this is possible, should be treated as a matter of urgency. Any unjustified delays should be reported to Headquarters. (…)

(b) Reunification of other dependent members of the family unit. It is the position of UNHCR that the reunification of the following categories of persons of particular concern is also required by the principle of family unity:

(i) **Dependent parents of adult refugees.** Humanitarian and economic considerations militate in favour of reunification of dependent parents who originally lived with the refugee or refugee family, or who would otherwise be left alone or destitute.

(ii) **Other dependent relatives.** Where persons such as single brothers, sisters, aunts, cousins, etc. were living with the family unit as dependents in the country of origin, or where their situation has subsequently changed in such a way (e.g., by the death of a spouse, parent or bread-winner) as to make them dependent upon refugee family members in the country of asylum, they should also be considered eligible for family reunification.

(iii) **Other dependent members of the family unit.** Sometimes families have taken in and cared for other unattached persons, such as friends or foster children, to whom they are not actually related by blood. If such persons are in the same situation as the relatives mentioned under (ii) above, they should also be considered eligible for UNHCR assistance with reunification. Care should however be taken to verify beforehand the true situation of such persons.

(c) Other relatives in need of resettlement. In certain cultures the basic family unit also includes grandparents, grandchildren, married brothers and sisters, their spouses and children, etc. For practical reasons, however, it is not the policy of the Office actively to promote the reunification of members of the extended family or other relatives who are still in the country of origin unless they come within the categories of persons defined in sections (a) and (b) above. On the other hand, UNHCR strongly supports the adoption by States of broad and flexible criteria of "family reunification" with respect to the selection of refugees for resettlement from countries of temporary sojourn. Efforts should be made to preserve the integrity of family groups in the course of resettlement operations and to promote the admission of refugees who need to be resettled into countries where they have relatives or other personal ties."

12. As I will explain, Mr Husain referred in his submissions to the concept of the nuclear family, which is mentioned in paragraph 5(a) of the UNHCR Guidelines, but I note that it is the UNHCR's view that the "principle of family unity" requires the reunification of a much wider category of individuals, including the dependent parents of adult refugees. Moreover, the UNHCR treats as part of the "nuclear family", and promotes the reunification of, at least those dependent, unmarried children, regardless of age, who were living with the parents in the country of origin.

13. In the European Union, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification ("the Family Reunification Directive") regulates family reunion and, in particular, Article 10(3) thereof obliges Member States to authorise the entry and residence for the purposes of family reunification of the parents of refugees who were unaccompanied minors. However, the Family Reunification Directive was not directly effective and had to be adopted by Member States, but the United Kingdom never adopted it and was never bound by it.

(2)(b) The Relevant Immigration Rules

14. Paragraphs 352A to 352G in Part 11 of the Immigration Rules were introduced in 2000. It was not suggested that there had been any material amendment to them between then and the hearing and I set them out in the form they were in at the time of the hearing. Pursuant to a statement of changes dated 11 May 2022, certain changes were made with effect from 28 June 2022, imposing more restrictive conditions in the case of applications for family reunion sponsored by adult refugees with temporary refugee protection (who are "Group 2" refugees as defined in section 12 of the Nationality and Borders Act 2022). Neither party suggested that those changes were relevant to my decision.

15. In relation to the partners of refugees, paragraph 352A of the Immigration Rules provides as follows:

> "The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the partner of a person granted refugee status are that:
>
> (i) the applicant is the partner of a person who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
>
> (ii) the marriage or civil partnership did not take place after the person granted refugee status left the country of their former habitual residence in order to seek asylum or the parties have been living together in a relationship akin to marriage or a civil partnership which has subsisted for two years or more before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and
>
> (iii) the relationship existed before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and
>
> (iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
>
> (v) each of the parties intends to live permanently with the other as their partner and the relationship is genuine and subsisting;
>
> (vi) the applicant and their partner must not be within the prohibited degree of relationship; and
>
> (vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity."

16. Paragraphs 352B, 352BA and 352C make provision for the grant or refusal of limited leave to enter or to remain in the United Kingdom in cases to which paragraph 352A applies.

17. In relation to the children of refugees, paragraph 352D of the Immigration Rules provides as follows:

> "The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:

> (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
>
> (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

18. Paragraphs 352E and 352F make provision for the grant or refusal of limited leave to enter or to remain in the United Kingdom in cases to which paragraph 352D applies.

19. Paragraphs 352FA to 352FI make equivalent provision to paragraphs 352A to 352F in the case of the partners or children of persons who have humanitarian protection granted on or after 30 August 2005. Paragraph 352FJ provides that paragraphs 352A to 352FI do not apply to the partners or children of British citizens. Paragraph 352G defines "country of origin" and "partner".

20. Paragraph 277 of the Immigration Rules provides as follows:

> "Nothing in these Rules shall be construed as permitting a person to be granted entry clearance, leave to enter, leave to remain or variation of leave as a spouse or civil partner of another if either the applicant or the sponsor will be aged under 18 on the date of arrival in the United Kingdom or (as the case may be) on the date on which the leave to remain or variation of leave would be granted. In these rules the term "sponsor" includes "partner" as defined in GEN 1.2 of Appendix FM."

21. The Immigration Rules therefore contain what Mr Husain characterised as a "straightforward path" towards the reunion in the United Kingdom of adult refugees with their partners and/or minor children, but no such path for the reunion of child refugees with their parents and/or siblings. This does not mean that the parents or siblings of child refugees in the United Kingdom cannot apply for and be granted leave to enter the United Kingdom in order to be reunited with their child and/or sibling, but such an application has to be made outside the Immigration Rules, as in the present case.

(2)(c) The Family Reunion Guidance

22. The Secretary of State published the first version of "Family reunion: for refugees and those with humanitarian protection" ("the Family Reunion Guidance") on 5 July 2011. At the hearing I was shown the fifth version, which was published on 31 December 2020, and which was the version applied when the applications made by the claimant's parents and siblings were determined. After the hearing, the parties

agreed that there was no material difference between this and the fourth version, published on 9 January 2020, which was the version in force when the claimant's parents and siblings made their applications. However, as I will explain later, an issue did arise as to certain changes made when the second version of this guidance was published on 29 July 2016.

23. The fifth version of the Family Reunion Guidance begins, in the chapter headed "About this Guidance", with the following on page 4:

> "This guidance tells you about our refugee family reunion policy, which allows a spouse or partner and children under the age of 18 of those granted refugee status or humanitarian protection in the UK to reunite with them here, providing they formed part of the family unit before the sponsor fled their country of origin or habitual residence. It must be used by caseworkers considering whether to grant entry clearance or leave to enter or remain for the purpose of family reunion in accordance with paragraphs 352A to 352FJ of Part 11 of the Immigration Rules."

24. The Family Reunion Guidance is concerned with the implementation of the relevant Immigration Rules, while also recognising the possibility of applications being made or considered outside the Rules. It states as follows on pages 6-7:

> "Application in respect of children
>
> The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children in the UK means that consideration of the child's best interests is a primary, but not the only, consideration in immigration cases. This guidance and the Immigration Rules it covers form part of the arrangements for ensuring that this duty is discharged.
>
> Although Section 55 only applies to children in the UK, the statutory guidance, *Every Child Matters - Change for Children*, provides guidance on the extent to which the spirit of the duty should be applied to children overseas. Caseworkers considering overseas applications must adhere to the spirit of the Section 55 duty and make enquiries when they suspect that a child may be in need of protection, or where there are safeguarding or welfare needs that require attention. In some instances, international or local agreements are in place that permit or require children to be referred to the authorities of other countries. Caseworkers must abide by these arrangements and work with local agencies in order to develop arrangements that protect children and reduce the risk of trafficking and exploitation.
>
> Caseworkers must carefully consider all of the information and evidence provided as to how a family member in the UK who is a child will be affected by a decision and this must be addressed when assessing whether an applicant meets the requirements of the Rules. The decision notice or letter must demonstrate that all relevant information and evidence provided about the best interests of a child in the UK have been considered. Caseworkers must carefully assess the quality of any evidence provided. Original documentary evidence from official or independent sources must be given more weight in

the decision-making process than unsubstantiated statements about a child's best interests.

Where it is relevant to a decision, caseworkers dealing with overseas applications must make it clear in their decision letter that the child's welfare has been considered in the spirit of section 55 without stating that it is a duty to do so.

Where an applicant does not meet the requirements of the Rules for entry clearance or leave to remain, caseworkers must, in every case, consider the 'Family life (as a partner or parent), private life and exceptional circumstances' guidance or consider whether there are any compassionate factors which may warrant a grant of leave outside the Immigration Rules."

25. Subsequent passages expressly recognise that a child refugee cannot sponsor his or her parents or siblings to enter the United Kingdom and that the parents and siblings of a child refugee are not eligible for family reunion under the Immigration Rules. It was not suggested to me that these passages were not contained in the first version of the Guidance, published in 2011.

26. On pages 18 and 19 the Family Reunion Guidance states, inter alia, as follows:

"Parents and siblings of a child recognised as a refugee

The parents and siblings of a child who have been recognised as refugees are not entitled to family reunion under the Immigration Rules. Where an application does not meet the requirements of the Immigration Rules, the caseworker must consider the 'Family life (as a partner or parent), private life and exceptional circumstances' guidance or consider whether there are any compassionate factors which may warrant a grant of leave outside the Rules. Each case must be considered on its individual merits and include consideration of the best interests of the child in the UK. As the Immigration Rules are specifically designed to meet our obligations under the European Convention on Human Rights (ECHR) in respect of family or private life, it is not expected there will be significant numbers granted outside the Rules. However, it is important that evidence relating to exceptional circumstances is carefully considered on its individual merits."

27. Again, it was not suggested to me that this passage was not contained in the first version of the Guidance, published in 2011.

28. A later section provides as follows (on pages 19 and 20):

"Exceptional circumstances or compassionate factors

Where a family reunion application does not meet the requirements of the Immigration Rules, caseworkers must consider whether there are any exceptional circumstances or compassionate factors which may justify a grant of leave outside the Immigration Rules.

There may be exceptional circumstances raised in the application which make refusal of entry clearance a breach of ECHR Article 8 (the right to respect for family life) because refusal would result in unjustifiably harsh consequences for the applicant or their family. Compassionate factors are, broadly speaking,

exceptional circumstances, which might mean that a refusal of leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but not constitute a breach of ECHR Article 8.

It is for the applicant to demonstrate as part of their application what the exceptional circumstances or compassionate factors are in their case. Each case must be decided on its individual merits. Entry clearance or a grant of leave outside the Immigration Rules is likely to be appropriate only rarely and consideration should be given to interviewing both the applicant and sponsor where further information is needed to make an informed decision. …"

29. Some examples are then given in this section of applications which might succeed outside the Rules, but none are relevant for present purposes. It is the section of the Guidance headed "Exceptional circumstances and compassionate factors" which was added when the second version of the Guidance was issued on 29 July 2016.

30. Pages 25 and 26 note a difference in treatment between successful applications under the Rules and successful applications outside the Rules. In the former case, the family member will be given leave to remain in line with the sponsor, so that, for instance, if the sponsor has indefinite leave to remain, the family member will be given indefinite leave to remain. In the latter case, the family member will be given leave to remain for 33 months and will be subject to a condition of no recourse to public funds.

(3) Developments in Relation to the Immigration Rules

31. The issue of family reunion for refugees and, specifically, for child refugees has been the subject of much debate, including:

(1) reports by the UNHCR, non-governmental organisations, parliamentary select committees and others, including the Independent Chief Inspector of Borders and Immigration ("the Chief Inspector");

(2) Home Office responses to reports by parliamentary select committees and the Chief Inspector;

(3) parliamentary questions; and

(4) private members' bills.

32. Aspects of this debate, as well as changes to the Immigration Rules and to the Family Reunion Guidance, were relied on by the parties as relevant to the issues arising in this case, including, in particular, the question whether the Secretary of State has at any time since 2 November 2009 discharged a function for the purposes of section 55 of the 2009 Act by, for instance, deciding not to amend the Immigration Rules to provide a route to family reunion for child refugees. What follows is not a comprehensive summary of this debate, but an account of the principal matters relied on by the parties.

(3)(a) 2016 Changes to the Immigration Rules

33. As I have said, it was not suggested to me that there has been any material change in the content of the relevant Immigration Rules since 2000, but on 11 March 2016 the

Secretary of State laid before Parliament a statement of changes to the Immigration Rules which included the deletion and re-enactment of the paragraphs dealing with refugee family reunion, i.e. paragraphs 352A to 352FJ, with some relatively minor changes to the provisions which apply to adult refugees.

(3)(b) 2016 Report of the House of Lords European Union Committee

34. On 26 July 2016 the House of Lords European Union Committee published its 2nd Report of Session 2016-17, on "Children in crisis: unaccompanied migrant children in the EU" (HL Paper 34). In paragraph 62 of that report, the Committee said:

> "We found no evidence to support the Government's argument that the prospect of family reunification could encourage families to send children into Europe unaccompanied in order to act as an "anchor" for other family members. …"

35. Then in paragraph 291 the Committee said:

> "We recommend that the UK Government reconsider its restrictive position on family reunification. …"

36. The Government's response to the House of Lords European Union Committee's report of 26 July 2016 is undated. In response to paragraph 291 of the report, the response states:

> "The Government believes that the reunion measures suggested in the recommendation will lead to more children setting out on unaccompanied journeys that will put their lives at risk. The Home Affairs Select Committee (HASC) acknowledged this in their recent report on the migration crisis published in August.
>
> We support the principle of family unity and have several routes for families to be reunited safely without the need for children to travel here illegally. Our family reunion policy allows those granted refugee status or humanitarian protection in the UK to sponsor their spouse or partner and children under the age of 18, who formed part of the family unit before the sponsor fled their country, to reunite with them here. Under this policy, we have granted over 22,000 family reunion visas over the past five years – reuniting many refugees with their immediate family.
>
> Where family members cannot meet the requirements of the Rules we consider whether there are exceptional circumstances or compassionate reasons to justify granting a visa outside the Rules. This caters for parents of unaccompanied children in exceptional circumstances. On 27 July we published revised Home Office policy guidance on family reunion to provide more clarity for applicants and their sponsors so that they can better understand the process and what is expected of them. The revisions include further guidance on the types of cases that may benefit from a grant of leave outside the Rules.
>
> Our family reunion policy meets our international obligations and we believe it strikes the right balance between reuniting families and ensuring that our

> Rules are not more generous than other European countries. We believe that allowing children to sponsor parents under the Rules would create perverse incentives for them to be encouraged, or even forced, to leave their family and risk hazardous journeys to the UK to sponsor relatives. This plays into the hands of criminal gangs who exploit vulnerable people and goes against our safe guarding responsibilities."

37. Despite the reference in this response to the Home Affairs Select Committee's report on the migration crisis, I was not shown that report and it was not suggested to me that it did in fact support the position adopted in the response.

(3)(c) 2016 Report of the House of Commons Home Affairs Committee

38. On 27 July 2016 the House of Commons Home Affairs Committee published its Sixth Report of Session 2016-17, on "The Work of the Immigration Directorates (Q1 2016)" (HC 151). In paragraph 41 of that report the Committee recommended that "the Government should amend the Immigration Rules to allow refugee children to act as sponsors for their close family."

(3)(d) 2017 Written Question

39. The following written question was tabled in the House of Lords by Baroness Lister:

> "To ask Her Majesty's Government what children's best interest evaluation has been made of their policy to refuse children entitled to asylum in the UK the family reunion rights granted to adults since the removal of the UK's immigration reservation to the 1989 UN Convention on the Rights of the Child in 2008."

40. On 5 April 2017 Baroness Williams, the Home Office Minister, provided the following written answer to this question:

> "The current family reunion policy meets our international obligations. Widening it to allow children to sponsor family members would create additional motives for them to be encouraged, or even forced, to leave their family, and risk hazardous journeys to seek to enter the UK illegally. This would play into the hands of criminal gangs who exploit vulnerable people, and goes against our safeguarding responsibilities.
>
> The Government believes that the best interests of children are reflected in their remaining with their families and claiming asylum in the first safe country they reach; this is the fastest route to safety."

(3)(e) The Belgian EMN Request

41. On 8 June 2017 the Belgian National Contact Point in the European Migration Network made an "EMN Ad-Hoc Query on Unaccompanied asylum-seeking children followed by family members under Dublin Regulations" ("the Belgian EMN request"). The Secretary of State relied on the responses to the Belgian EMN Request as providing evidence which supported her policy not to provide in the Immigration Rules a route to family reunion for child refugees.

(3)(f) Response to the House of Commons Home Affairs Committee

42. On 26 October 2017 the Secretary of State sent to the House of Commons Home Affairs Committee the Government's response to the Committee's report of 27 July 2016. The Government's response stated as follows in response to the recommendation contained in paragraph 41 of the Report:

> "We do not accept this recommendation. Our current family reunion policy meets our international obligations and we do not believe that widening the criteria is necessary. We must not create perverse incentives for children to be encouraged, or even forced to leave their families and risk dangerous journeys hoping relatives can join them later. This has the potential to play into the hands of criminal gangs seeking to exploit vulnerable people and goes against our safeguarding responsibilities. Those who need international protection need to claim asylum in the first safe country they reach – that is the fastest route to safety – rather than travelling into and across Europe to reach the UK.
>
> Where an entry clearance application fails under the Immigration Rules, we consider whether there are exceptional circumstances or compassionate reasons to justify granting a visa outside the Rules. This caters for extended family members, including parents of children recognised as refugees here, in exceptional circumstances."

(3)(g) The UK EMN Request

43. On 27 February 2018 the United Kingdom's National Contact Point in the European Migration Network made an "EMN Ad-Hoc Query on Evidence on the impact that policy changes on the right to refugee family reunion may have on asylum intake and the number of family reunion applications received" ("the UK EMN Request"). It began:

> "The UK are currently reviewing the policy on refugee Family Reunion and listening to the concerns from Non-Government Organisation's [*sic*] that the current policy and the Immigration Rules on family reunion are too narrow. This work is part of our wider asylum and resettlement strategy. We are gathering evidence on whether changes to policy creates a "pull factor" that may lead to more people risking dangerous journeys to Europe, and on the number of refugee family reunion applications that could be expected with associated analysis of the impact of the cost on public services."

44. Although the UK EMN Request referred to a review which was said to be current in 2018, neither party provided any evidence as to the progress or outcome of this review. The claimant relied on the responses to the UK EMN Request as evidence which contradicted the Secretary of State's policy not to provide in the Immigration Rules a route to family reunion for child refugees.

(3)(h) Proposed Legislation

45. On 16 March 2018 there was the second reading of a private member's bill, the Refugees (Family Reunion) (No. 2) Bill 2017-19, which had been introduced by Angus MacNeil MP. The bill proposed:

(1) to expand the definition of "family member" for family reunion purposes to include parents and siblings, thereby giving unaccompanied refugee children the right to sponsor family members; and

(2) to increase the age limit for children and siblings to 25 under certain conditions.

46. On 11 July 2018 the Refugees (Family Reunion) Bill 2017-19 had its first reading. It was sponsored by Baroness Hamwee and Tim Farron MP. It was similar to the Refugees (Family Reunion) (No. 2) Bill, but also included in the definition of "family members":

(1) unmarried adult children of any age;

(2) nieces and nephews under the age of 18; and

(3) "any dependent relative not otherwise listed".

47. These bills were not supported by the Government and were not enacted in the 2017-19 session, which ended in October 2019.

48. On 5 March 2019 Stuart C McDonald MP moved an amendment to the Immigration and Social Security Co-ordination Bill, seeking to add a clause which would have allowed any refugee to sponsor the entry of:

(1) their children under the age of 25 who were under 18 or unmarried when the refugee left their country of residence;

(2) their parents; or

(3) their siblings under the age of 25 who were under 18 or unmarried when the refugee left their country of residence.

49. This clause was not enacted.

(3)(i) Response to the Chief Inspector's 2018 Report

50. In September 2018 the Home Office published its response to the Chief Inspector's 2018 report on "A re-inspection of the family reunion process, focusing on applications received at the Amman Entry Clearance Decision Making Centre (November 2017 to April 2018)", in which the Chief Inspector had said that family reunion policy development had ceased to be a priority. The Home Office said that it was:

> "reviewing the approach to Family Reunion as part of the wider asylum and resettlement strategy. As part of this review, consideration is being given to the recent debates on Refugee Family Reunion in the context of two Private Members' Bills (Baroness Hamwee's in the Lords, and Angus MacNeil's in the Commons). The passage of these Bills will be followed closely whilst productive discussions with key Non-Governmental Organisations (NGOs) in this area continue. Family Reunion policy development remains a high

> priority and the guidance will be updated once a firm position has been reached."

51. The next (and third) version of the Family Reunion Guidance was published in March 2019, but only minor changes were made.

(3)(j) 2019 Written Question

52. On 24 June 2019 the following question was tabled in the House of Commons:

> "To ask the Secretary of State for the Home Department, what assessment he has made of the of the potential merits of (a) allowing child refugees to sponsor their close family and (b) changing the definition of family to include young people over the age of 18 and elderly people under the age of 65 so that families can be reunited in the UK."

53. On 2 July 2019 a written answer to this question was published, which included the following:

> "The Government is listening carefully to calls to extend refugee family reunion policy and we will continue our productive discussions with stakeholders on this complex and sensitive issue. However, any changes must support the principle that those who need protection claim in the first safe country they reach – and use safe and legal routes to come here."

(3)(k) 2019 House of Lords European Committee Report

54. On 11 October 2019 the House of Lords European Union Committee published its 48th report of session 2017-19, on "Brexit: refugee protection and asylum policy", in paragraph 240 of which the committee stated that it supported the Families Together coalition's campaign to expand the United Kingdom's refugee family reunion rules. According to paragraph 199 of the report, the key demands of the coalition included:

> "(a) Giving child refugees in the UK the right to sponsor their parents and siblings under the age of 25;
>
> (b) Expanding the definition of who qualifies as family so that adult refugees in the UK can sponsor their adult children, siblings under the age of 25 and their parents;"

(3)(l) The Chief Inspector's 2020 Report

55. On 7 January 2020 the Chief Inspector sent to the Secretary of State his report on "An inspection of family reunion applications (June-December 2019)". He subsequently presented this report to Parliament in October 2020 and published it on 8 October 2020.

56. The Chief Inspector said in paragraph 5.35 of his report that the Home Office had explained in its evidence that responsibility for family reunion policy moved in early 2019 from the Asylum Decisions Policy Team to the Asylum Strategy Team:

> "… in part to "think holistically about this route and implications for policy development across the asylum and resettlement system" and also driven by increasing stakeholder and political interest."

57. However, it appears from paragraph 11.2 of his report that some family reunion policy work remained with the Asylum Decisions Policy Team. The Chief Inspector said as follows in paragraph 5.36 of his report:

> "The Asylum Decisions Policy Team and the Asylum Strategy Team, both managed by the same grade 6, retained some responsibilities for family reunion-related issues. The former told inspectors that it aimed to review family reunion policy every 12 months, but until the outcome of the two Private Members' Bills was known there was nothing specifically to review. …"

58. The Chief Inspector dealt in paragraphs 6.12 to 6.17 of his report with the inability of child refugees to sponsor family reunion applications. He noted in paragraph 6.13 that, at the time of his inspection, the UK was the only EU Member State which did not allow a child refugee to sponsor family members for family reunion.

59. In paragraph 6.15 of his report the Chief Inspector said as follows:

> "Home Office policy staff told inspectors that most major decisions about family reunion policy were made by ministers and "sometimes decisions taken are inevitably political. That is out of our control ultimately." The Home Office did not share any advice that it had put to ministers regarding policy options for family reunion. Inspectors asked for the rationale for excluding children from sponsoring family reunion applications. The Home Office's response echoed what ministers had previously told Parliament:
>
> > "If children were allowed to sponsor parents, this would risk creating incentives for more children to be encouraged, or even forced, to leave their family and risk hazardous journeys to the UK. This plays into the hands of criminal gangs who exploit vulnerable people and goes against our safeguarding responsibilities. This position supports our commitment to protecting vulnerable individuals.""

60. The quotation is from a speech made by the Minister for Immigration, Caroline Nokes MP, in the House of Commons on 2 July 2019. The Chief Inspector went on in paragraph 6.16 of his report to say that:

> "The Home Office did not provide any supporting evidence for this assessment. …"

61. The Chief Inspector then referred to the UK EMN Request and the responses to it, about which he said as follows:

> "… the Home Office told inspectors that "it was difficult to disaggregate the relative impact of varying pull factors and it was difficult to directly compare other EU country policies on family reunion – other countries vary in their criteria and those who are eligible for refugee family reunion.""

62. Finally, in paragraph 6.17 of his report, the Chief Inspector said:

> "Home Office staff told inspectors that child sponsors was a "ministerial red line". However, it was being considered by the Home Office's Digital and Data team as part of broader piece of work to assess the "pull factors" that arise when changes are made to asylum policy."

63. In paragraph 4.4 of his report, the Chief Inspector recommended that the Home Office should:

> "Pending any new legislation, clarify the Home Office's position (with supporting evidence) in relation to those areas of the present policy that have been the subject of Parliamentary and stakeholder interest, in particular: child sponsors; dependent family members over 18 years of age; …"

64. The Home Office response to the Chief Inspector's report is undated, but it had been produced by 8 October 2020, when the Chief Inspector published his report. The Home Office said that it accepted the recommendation contained in paragraph 4.4. of the report and provided the following by way of clarification of its position in relation to child sponsors in paragraphs 4.3 and 4.4 of its response:

> "4.3 The Government has made clear in the past its concern that allowing children to sponsor parents would risk creating incentives for more children to be encouraged, or even forced, to leave their family and attempt hazardous journeys to the UK. This would play into the hands of criminal gangs, undermining our safeguarding responsibilities.
>
> 4.4 Government policy is not designed to keep child refugees away from their parents, but in considering any policy we must think carefully about the wider impact to avoid putting more people unnecessarily into harm's way. There is a need to better understand why people choose to travel to the UK after reaching a safe country. It is important that those who need international protection should claim asylum in the first safe country they reach – that is the fastest route to safety."

65. The Chief Inspector commented on this as follows when he published his report:

> "[The Home Office's] clarification simply reiterates its familiar lines and offers no supporting evidence to show that it has either monitored or evaluated the impact of its policies."

(3)(m) The Fifth Version of the Family Reunion Guidance

66. As I have said, the fifth version of the Family Reunion Guidance was published on 31 January 2020, but it was not suggested to me that it made any material amendment to the previous version.

(3)(n) The Response to the Pre-Action Protocol Letter

67. In paragraphs 5.01 and 5.02 of her response of 23 September 2020 to the claimant's pre-action protocol letter of 8 September 2020, the Secretary of State said as follows:

> "5.01 The UK Government has made clear in the past its concerns about allowing children to sponsor family members and the risk of creating incentives for more children to be encouraged, or even forced, to leave their family and risk hazardous journeys to the UK. This plays into the hands of criminal gangs who exploit vulnerable people and is inconsistent with our safeguarding responsibilities. There is a need to better understand why large numbers of unaccompanied minors make often dangerous journeys to the UK, when they should be claiming asylum in the first safe country they reach.
>
> 5.02 The policy is not designed to keep child refugees apart from family members, but in considering any policy we must think carefully about its potential impacts."

(3)(o) A Third Private Member's Bill

68. On 23 May 2022 Baroness Ludford introduced a private members' bill, the Refugees (Family Reunion) Bill, which would, if enacted in its current form, oblige the Secretary of State to lay before Parliament a statement of changes to the Immigration Rules which made provision for refugee family reunion by setting out rules which made provision for leave to enter or remain in the United Kingdom to be granted to family members of a refugee. "Family members" in this context are defined as including parents, spouses and partners, and also children and siblings who are under 18 or are under 25 and were either under 18 or unmarried when the refugee left their country of residence.

(4) The Best Interests of Child Refugees

69. The claimant relied on a substantial body of witness statements and reports in support of the propositions that:

(1) in general, it is in the best interests of unaccompanied refugee children to be reunited with their families; and

(2) in general, it is in the best interests of unaccompanied refugee children to have a straightforward path to that result.

70. I need not review that evidence in any detail, since these two propositions were not seriously contested. Indeed, the Secretary of State's own guidance on "Children's asylum claims" states (on pages 70-71 of the current, fourth version, published on 31 December 2020), albeit in the context of considering the possible return of a child to join his or her family abroad, that:

> "Family reunification must generally be regarded as being in the best interests of the child, but a full assessment must be made of this taking into account the child's individual circumstances and recorded on the file. Possible locations for family reunification must be taken fully into account.

> There may, however, be instances where family reunification is not in the child's best interests. This may be when the material facts of the claim for protection involve elements of persecution or ill treatment at the hands of family."

71. Moreover, the Secretary of State said in paragraph 5 of her skeleton argument that:

> "… in general terms, the Defendant recognises that it will usually be in the best interests of children not to be separated from their parents and siblings."

72. The principal difference between an application for family reunion pursuant to paragraph 352A and/or 352D of the Immigration Rules and an application outside the Rules is that an application made outside the Rules has to satisfy the high hurdle of showing "exceptional circumstances", which is much harder for an applicant to achieve, generally requires more extensive factual and, often, expert evidence than an application made pursuant to paragraph 352A and/or 352D and is more stressful. The claimant's unchallenged evidence was that, as a result, the families of some refugee children are deterred from applying at all, those who do apply are faced with far higher rates of refusal and a greater proportion of them have to go through the appeals process. Finally, as I have already noted, the Family Reunion Guidance provides that, where an application made outside the rules is successful, the family members will receive 33 months' leave (which can be extended on application) and can have no recourse to public funds.

(5) The Claimant's Experiences

73. Given the success of the appeal by the claimant's parents and siblings and the consequent narrowing of the scope of the claimant's application for judicial review, it is not necessary for me to look at his experiences in as much detail as might otherwise have been the case. However, his position is relevant to the question of standing and Mr Husain also relied on his experiences as further evidence of the potential adverse effects on child refugees of both separation from their family and the process of applying for family reunion outside the Immigration Rules.

74. The claimant's evidence, which was not challenged, was that he left Eritrea in about March 2014, when he was 11, in fear that he would be forcibly conscripted into military service. He went first to Ethiopia, staying there for over a year and a half, and then spent 2 months in Sudan, about 4 months in Libya, some time in Italy and about 6 months in France before arriving in the United Kingdom on 7 May 2017. He had some contact with his family when he was in Sudan and resumed contact once he was in the United Kingdom. In 2018 he learnt that they too had left Eritrea for Ethiopia, fearing that his younger siblings would be forced into military service.

75. The claimant's evidence was that, although he was granted asylum on 9 November 2018, he did not learn until 2020 that it was possible to apply for family reunion. The applications were made on 8 September 2020, when his solicitors also sent the claimant's pre-action protocol letter. He lost contact with his family for a period after November 2020.

76. Visas were issued to the Claimant's parents and siblings on 7 July 2022. They were granted leave to remain in line with the claimant (i.e. until 8 November 2023) and

they were not made subject to the condition of no recourse to public funds. The claimant's father and three of his siblings entered the United Kingdom on 13 September 2022.

77. It was not disputed that, as a result of his experiences, the claimant suffers from post-traumatic stress disorder and depression, as diagnosed by Dr Yasmin Pithania, who has prepared three reports. In his statements, the claimant speaks in graphic terms of the distress caused by being separated from his family and by the application and appeal process. As to that, Dr Pithania's opinion is that:

(1) the separation from his family has had a significant detrimental effect on the claimant's mental health, contributed to the deterioration in his mental health between August 2020 and February 2021 and precludes his development into a healthy adult;

(2) the claimant experienced suicidal ideation for the first time following the refusal of the applications in June 2021; and

(3) the appeal process was a significant contributory factor in exacerbating his symptoms of PTSD and depression and Dr Pithania was concerned that the dismissal of his appeal would result in further deterioration in his mental health and an escalation in the risk of suicide.

78. In paragraph 15 of his statement dated 15 October 2021 the claimant said that he did not want other children to go through what he had gone through. Then, following the success of the appeal, he made a statement dated 10 May 2022, in paragraphs 10 and 11 of which he said, inter alia, as follows:

> "10. I want to continue with this Judicial Review claim because I don't think the way cases like mine are treated is fair or makes sense. All I could think about for the last two years was my case. It has consumed my whole life. …
>
> 11. If the way the Home Office treat cases like mine and my family's is against the law, I want that to be recognised. … I would really like to be able to use my experiences to make sure others do not go through the same."

(6) Standing

79. Section 31(3) of the Senior Courts Act 1981 provides as follows:

> "No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

80. Although permission to apply for judicial review was granted by Cotter J on 22 February 2022, there was a significant change in the claimant's circumstances when his family's appeal was allowed on 10 March 2022. As I have already said, this resulted in a reduction in the scope of the application for judicial review.

Consequently, the claimant did not submit that it was inappropriate for me to consider the issue of standing at this stage.

81. The defendant submitted that the claimant did not have a sufficient interest in the matter to which the application now relates because the relief sought was not capable of conferring a benefit on the claimant and because his desire to prevent other young refugees having the same experience as him did not confer standing on him, not least because there were, or would be, other, better-placed challengers.

82. The claimant submitted that the relief sought might benefit him, since the reconsideration by the Secretary of State of her policy might result in the claimant's family receiving leave to remain for a longer period and without the condition of no recourse to public funds, but it seems that his family have been given leave to remain in in line with his leave and that they have not been made subject to the condition of no recourse to public funds.

83. The claimant also submitted that his desire to benefit other young refugees did confer standing on him and that he was a particularly well-placed challenger, given that he had been directly adversely affected by the policy in issue.

84. Both parties referred to paragraph 33 of Chamberlain J's judgment in *JS*, which was in the following terms:

> "… It is true that the requirement for a "sufficient interest" has been applied liberally, particularly in cases where non-governmental organisations and others representing the public interest have challenged decisions by which they cannot claim to be personally affected, generally in the absence of other better placed actual or potential challengers: see eg *R (McCourt) v Parole Board* [2020] EWHC 2320 (Admin), [31]-[32]. There are important reasons for this, as Lord Reed's judgment in *Axa* shows. But the present claimant is not an NGO and does not claim to represent any interest other than his own. Moreover, it is not and could not be said that there are no challengers directly affected by the policy who could realistically be expected to litigate. To start with, there are at least two other challenges to the same policy in which the claimant is represented by JS's legal team. These claims were stayed behind this one by Farbey J."

85. The present case was one of the two other challenges referred to by Chamberlain J. JS can be distinguished from the claimant in the present case in two respects:

(1) No valid application for family reunion was made while JS was still a child.

(2) JS did not claim to represent the interests of other child refugees.

86. Chamberlain J recognised in his judgment that the claimant in the present case was better-placed than JS to challenge the defendant's family reunion policy. When I asked Miss Giovanetti to identify a better-placed claimant or claimants, she could not point to any identified claimant, but suggested instead that a refugee whose family members were refused entry clearance in a decision made while the refugee was still a child would be better-placed to bring the present challenge.

87. In my judgment, the claimant has sufficient interest to bring the present application. He was directly affected by the matters complained of. Although his parents and siblings have now been granted leave to enter the United Kingdom, the process was longer, more difficult and more stressful than it would have been if the Immigration Rules had been amended in the manner contended for by the claimant and that appears to have contributed to the claimant's mental health issues. There is no identifiable alternative claimant who is better-placed than the claimant to bring this application.

(7) The Immigration Rules

88. As Lord Hoffmann said in paragraph 6 of his judgment in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230:

> "The status of the immigration rules is rather unusual. They are not subordinate legislation but detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration. But they create legal rights: …"

89. Before turning to the individual grounds of challenge, it is worth saying something about the Immigration Rules, for two reasons:

(1) Although complaint was made about the Family Reunion Guidance, Mr Husain acknowledged that the focus of the claimant's challenge is on the Immigration Rules and on the Secretary of State's decision not to amend the Immigration Rules so as to give child refugees a straightforward path to family reunion under the Rules. He acknowledged that such a change could only be effected by a change to the Immigration Rules.

(2) Both parties made submissions as to the status of the Immigration Rules in the context of addressing the appropriate level of scrutiny of the Secretary of State's decision.

(7)(a) The Obligation to Lay the Immigration Rules before Parliament

90. Section 3(2) of the Immigration Act 1971 begins as follows:

> "The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances; …"

91. The Supreme Court considered in *R (Alvi) v Secretary of State for the Home Department* what constituted a "rule" for the purposes of section 3(2) and the majority of them agreed with Lord Dyson's formulation (at paragraph 94) that a rule is, inter alia, "any requirement which a migrant must satisfy as a condition of being given leave to enter or leave to remain": see paragraphs 57 (per Lord Hope), 122 (per Lord Clarke) and 128 (per Lord Wilson).

92. Mr Husain accepted that the provisions which the claimant contends that the Secretary of State ought to introduce to provide a straightforward path to family reunion for child refugees would constitute rules as so defined and that, consequently, the Secretary of State could only lawfully introduce them by laying before Parliament a statement of changes to the Immigration Rules.

93. By contrast, the Supreme Court held in *R (Munir) v Secretary of State for the Home Department* [2012] 1 WLR 2192 that a concessionary policy to the effect that a rule may be relaxed if certain condition are satisfied, but that whether it will be relaxed depends on all the circumstances of the case, is not a rule which has to be included in the Immigration Rules. This applies to the defendant's policy that the family members of child refugees may be granted entry clearance outside the Immigration Rules if they can demonstrate exceptional circumstances.

(7)(b) The Negative Resolution Procedure

94. Although they are not statutory instruments, the Immigration Rules are laid before Parliament and they are subject to the negative resolution procedure. Section 3(2) of the Immigration Act 1971 concludes as follows:

> "… If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution (but exclusive as aforesaid)."

95. Lord Hope said as follows about the difference between the affirmative resolution procedure and the negative resolution procedure in paragraph 12 of his speech in *R (Stellato) v Secretary of State for the Home Department* [2007] 2 AC 70:

> "The affirmative resolution procedure requires that a resolution must be passed by both Houses before the order or rules can be made. This provides an opportunity for scrutiny and debate in the chamber of each House or, in the case of the House of Lords, its detailed consideration in Grand Committee before a resolution is put to the vote in the chamber. The negative resolution procedure is a less rigorous form of parliamentary control. The instrument is laid before both Houses for a period of 40 days. It takes effect on the expiry of that period unless it has been defeated by a resolution annulling it or praying that it be annulled. It is rare for instruments which are subject to the negative resolution procedure to be challenged in this way, and it is even rarer for such a challenge to be successful. In practice, subjecting the exercise of the power to the affirmative resolution procedure is the only way of ensuring that an opportunity is given for debate on an order or rule that is made under it."

(8) Ground 1: Section 55 of the 2009 Act

(8)(a) The Nature of the Section 55 Duty

96. Section 55 of the 2009 Act came into force on 2 November 2009. It provides, insofar as is material for the purposes of this case, as follows:

> "(1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, …
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

97. In paragraph 92 of their judgment in *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] 1 WLR 773 (*"MM"*), Baroness Hale and Lord Carnwath said that:

> "… The duty imposed by section 55 of the 2009 Act stands on its own feet as a statutory requirement apart from the HRA or the Convention. It applies to the performance of any of [*the*] Secretary of State's functions including the making of the [*Immigration*] Rules."

98. See also paragraph 46, in which they noted that it was common ground that the duty imposed by subsection 55(1) applies not only to the making of decisions in individual cases, but also to the function of making the Immigration Rules and giving guidance to officials.

99. Consideration of this and other authorities led David Richards LJ to set out the following undisputed propositions in paragraph 70 of his judgment in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2021] 1 WLR 3049 (*"PRCBC"*):

> "(i) Section 55 was enacted to give effect in domestic law, as regards immigration and nationality, to the UK's international obligations under article 3 of the 1989 United Nations Convention on the Rights of the Child (UNCRC). The UK is a party to the UNCRC and in 2008 withdrew its reservation in respect of nationality and immigration matters. Article 3 provides that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Although section 55 uses different language, it is conventional and convenient to

refer to a duty under section 55 as being to have regard, as a primary consideration, to the best interests of the child.

(ii) The duty is imposed on the Secretary of State. She is bound by it, save to the extent (if any) that primary legislation qualifies it; we were not referred to any qualifying legislation.

(iii) The duty applies not only to the making of decisions in individual cases but also to the function of making subordinate legislation and rules (such as the Immigration Rules) and giving guidance. The fact that subordinate legislation or rules are subject to the affirmative vote of either or both Houses of Parliament does not qualify the Secretary of State's statutory duty under section 55.

(iv) The best interests of the child are a primary consideration, not the primary consideration, still less the paramount consideration or a trump card. This does, however, mean that no other consideration is inherently more significant than the best interests of the child. The question to be addressed, if the best interests point to one conclusion, is whether the force of other considerations outweigh it.

(v) This in turns means that Secretary of State must identify and consider the best interests of the child or, in a case such as the present, of children more generally and must weigh those interests against countervailing considerations."

100. An additional point to which attention was drawn in the present case is that section 55(1)(a) refers specifically to the welfare of children who are in the United Kingdom. I was not referred to any authority in which consideration has been given to the significance of the inclusion in subsection 55(1)(a) of the words "who are in the United Kingdom." Mr Husain accepted that the presence of those words did not mean that the welfare of children who are outside the United Kingdom is irrelevant to the discharge of the Secretary of State's functions, but he submitted that the duty imposed by subsection 55(1) does not refer to the welfare of such children.

(8)(b) The Development of the Rival Cases on Section 55

101. The position of both parties in relation to this aspect of the case has undergone some development at various stages, i.e. before, during and after the hearing.

(8)(b)(i) The Claimant's Case

102. As set out in section 7 of the amended claim form, the claimant seeks a declaration in the following terms:

> "… that in establishing and maintaining a position under the Immigration Rules and relevant published policy whereby (i) parents and siblings of refugee children are not entitled to family reunion under the Immigration Rules, (ii) on the same basis as the spouses and children of adult refugees under the Immigration Rules, the Secretary of State has (a) failed to discharge her duties under section 55 of the Borders, Citizenship and Immigration Act 2009; …"

103. As to this, three points emerged during the course of the hearing:

(1) The claimant's complaint is really about the relevant provisions of the Immigration Rules, rather than the published guidance on the application of those Rules. As I have already noted, Mr Husain acknowledged that the Secretary of State could not have used an amendment to the Family Reunion Guidance, or anything else short of a change to the Immigration Rules, to introduce the change for which the claimant contends.

(2) The "establishment" of the relevant "position" under the Immigration Rules took place in 2000, long before section 55 came into force. The claimant cannot complain about a failure to comply with section 55 in 2000, when section 55 was not in force.

(3) Consequently, the claimant's case is that the Secretary of State failed to comply with section 55 when "maintaining" the relevant position after section 55 came into force.

104. This last point led me to ask during the hearing what the claimant contended was the relevant "function" which the Secretary of State had discharged on one or more occasions since 2 November 2009. I invited the parties to make written submissions on this point after the hearing. I will deal later with the written submissions which the parties made.

(8)(b)(ii) The Secretary of State's Case

105. The Secretary of State's first response to the allegation that she had not complied with her duty under section 55 of the 2009 Act was to point to the reference to section 55 in the Family Reunion Guidance: see paragraphs 19 and 20 of the Summary Grounds of Defence and paragraphs 29 to 31 of the Detailed Grounds of Defence. This, however, was not a response to the claimant's case, since the reference to section 55 in the Family Reunion Guidance concerned the consideration of individual cases, rather than the making of the Immigration Rules themselves.

106. The Secretary of State's second response to the allegation that she had not complied with her duty under section 55 of the 2009 Act was to assert that her policy promotes the best interests of children generally, because it does not incentivise families to send their children alone on long and dangerous journeys to the United Kingdom to act as "anchors" to facilitate later applications for family reunion: see paragraph 21 of the Summary Grounds of Defence and paragraphs 32 to 34 of the Detailed Grounds of Defence. This response prompted the reply from the claimant that the Secretary of State had considered the welfare of children who are outside the United Kingdom rather than, as required by section 55, the welfare of children who are in the United Kingdom.

107. In this context, Mr Husain made clear in the hearing that it was not his case that the Secretary of State could not lawfully conclude that the best interests of children who are in the United Kingdom were outweighed by the best interests of children who are not in the United Kingdom, but who might be used as "anchor children". His case was that the Secretary of State had neither identified nor considered the best interests

of child refugees in the United Kingdom when considering whether or not to change the Immigration Rules.

108. In the hearing, it did not appear to me that Miss Giovannetti was submitting that the Secretary of State had ever made arrangements which were compliant with section 55 in relation to "maintaining" the position established when the Immigration Rules were changed in 2000. Miss Giovannetti confirmed that that was the case. In essence, therefore, the case which she advanced was that the Secretary of State had not discharged a relevant function since 2 November 2009. In putting the Secretary of State's case in that way, Miss Giovannetti, as I understand it, quite properly accepted that, if the Secretary of State had discharged a relevant function during those years, she had not complied with her duty under section 55 when discharging that function.

(8)(c) Written Submissions after the Hearing

109. Following the hearing, the parties produced written submissions by the end of June. The claimants' submissions raised both factual and legal matters which had not previously been relied on. Accordingly, I invited further submissions on a number of issues, including some issues which had arisen from my own review of the documents. The parties provided their further written submissions in September 2022. I requested further clarification of the Secretary of State's position on certain issues raised by the claimant's written submissions and also enquired whether, having regard to the fact that the relevant submissions were made after the hearing and, in particular, that the relevant authorities were not cited until after the hearing, the Secretary of State wished to adduce any evidence in support of her position.

110. In his written submissions, the claimant submitted that the authorities:

(1) suggest that a broad and non-technical approach should be taken to the identification of relevant functions for the purposes of section 55; and

(2) support the common-sense view that these include formulating, amending/updating and considering whether to alter or maintain the Immigration Rules and associated policies.

111. The claimant relied for this purpose on the following authorities:

(1) *MM* and *PRCBC*, to which I have already referred;

(2) three more cases concerning section 55, i.e. *R (ST) v Secretary of State for the Home Department* [2021] 1 WLR 6047 (*"ST"*); *R (MA) v Coventry City Council* [2022] EWHC 98 (Admin) (*"MA"*); and *MK*; and

(3) two cases concerning the public sector equality duty imposed by section 149 of the Equality Act 2010, i.e. *R (The 3Million Ltd) v Cabinet Office* [2021] EWHC 245 (Admin) (*"3Million"*); and *R (Badmus) v Secretary of State for the Home Department* [2020] 1 WLR 4609 (*"Badmus"*).

112. While his primary position was that it was not necessary for him to identify precisely the point when the Secretary of State had discharged a relevant function or functions,

the claimant submitted that the Secretary of State had discharged a relevant function for the purposes of section 55 on one or more occasions since 2 November 2009, i.e.:

(1) on 5 July 2011, when publishing the first version of the Family Reunion Guidance;

(2) on 11 March 2016, when laying before Parliament the statement of changes to the Immigration Rules in which the paragraphs concerning family reunion were deleted and re-enacted;

(3) in July 2016, when amending the Family Reunion Guidance;

(4) in 2016, when rejecting the recommendation of the House of Lords European Union Committee to change the Immigration Rules;

(5) on 2 November 2017, when rejecting the recommendation of the House of Commons Home Affairs Committee to change the Immigration Rules;

(6) on 27 February 2018, when the UK EMN Request was sent;

(7) in the then-current review referred to in the Home Office's September 2018 response to the Chief Inspector's 2018 report;

(8) on 9 January 2020, when publishing the revised version of the Family Reunion Guidance;

(9) in 2020, when the Home Office responded to the Chief Inspector's recommendation to clarify the Home Office's position on child sponsors; and/or

(10) on 23 September 2020, when the Secretary of State responded to the claimant's pre-action protocol letter.

113. The Secretary of State submitted that she had not, since 2 November 2009, discharged any function (such as making a rule or subordinate legislation) which triggered section 55 and that:

> "… it would be a significant extension of the ambit of s. 55 to hold that it applies where the SSHD does not propose to make any changes to her current policy or practice. While the SSHD will, of course, consider representations or recommendations that she should do so, declining to accede to such representations or recommendations is not a "function" engaging s. 55."

(8)(d) Further Submissions and Evidence

114. In October 2022 I asked for further clarification of the Secretary of State's position on both the law and the facts. As a result, in November 2022 the Secretary of State filed further written submissions and a witness statement made by Jason Büültjens, who has been since 2019 the Head of Domestic Asylum Policy within the Asylum, Protection and Enforcement Directorate in the Home Office. Mr Büültjens confirmed that the position as set out in paragraphs 9 to 11 of the further written submissions was correct. Those paragraphs state as follows:

> "9. The Secretary of State is not aware of any occasion since s.55 came into force (2 November 2009), when the relevant decision makers (namely Home Office Ministers or the Secretary of State) decided to review the Immigration Rules in order to consider providing a route to family reunion for child refugees (i.e. introducing criteria within the Rules governing decisions whether or not to grant leave to enter to the parents and siblings of refugee children).
>
> 10. Records since 2015 indicate that the consistent position of the relevant decision makers, as communicated to officials, has been that they are not prepared to change the existing and long-standing policy of considering applications for leave to enter by immediate family members of child refugees on a case-by-case basis outside the Immigration Rules. Thus, for example, Ministers were clear that changing that policy was not one of the options to be included in 2021 consultation on the New Plan for Immigration (which fulfilled the statutory obligation to review legal routes to the UK from the European Union (EU) for protection claimants, set out in the Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020).
>
> 11. As to the position before 2015, a search has been conducted, but the Secretary of State been unable to find relevant communications from Ministers to officials dating back beyond that date. To the best of the Secretary of State's knowledge, even prior to 2015, the relevant decision makers were consistent in their position that they intended to maintain the existing policy, as summarised above. This is supported by Family Reunion Guidance from 2007 to 2011 (see Jason Büültjens' witness statement, para 7)."

115. In paragraph 7 of his witness statement, Mr Büültjens stated as follows:

> "All relevant records have been checked. Records since 2015 indicate Ministers have been consistent in their position not to change the existing and long-standing policy position regarding child refugees. A search has been conducted for Ministerial communications to officials on the subject prior to 2015 but we have not been able to find relevant records. Nonetheless, we have found that Family Reunion guidance from 2007 to 2011 makes clear that minors were not eligible sponsors under the Immigration Rules."

116. In written submissions in reply, the claimant indicated that he did not object to the filing of this evidence, but reiterated his submission that the Secretary of State did discharge a relevant function on one or more occasions since 2 November 2009. I note, however, that the claimant did not allege that the Secretary of State was wrong not to include changing the Immigration Rules so as to create a route to family reunion for refugee children as an option in the 2021 consultation on the New Plan for Immigration, undertaken pursuant to the Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020).

(8)(e) The Timing of the Application

117. One of the questions on which I invited further written submissions concerned the timing of the application for judicial review, in the context of the reformulation of the claimant's case as set out in his post-hearing submissions. Having noted that the decision to be judicially reviewed was said in section 3 of the amended claim form to be an ongoing decision and that that was the decision in respect of which permission to apply for judicial review had been granted, I asked whether any issue arose as to the timing of the application insofar as it was alleged that the Secretary of State had discharged a relevant function in, say, 2016.

118. CPR 54.5(1) provides that the claim form must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose. In their further written submissions, both parties agreed that the question of when the grounds to make the claim first arose falls to be determined in accordance with the Court of Appeal's decision in *Badmus*. The court said as follows in paragraphs 62 and 62 of its judgment:

> "62. The next disputed issue, which it is necessary to resolve, is the legal test applicable to determine when "the grounds to make the claim" for judicial review of the 2013 DSO and the May 2018 Review Decision "first arose", in the language of CPR 54.5(1). Before us the parties are agreed, as they were before the Judge, that the correct approach is that expressed by the Divisional Court in *DSD* at [167] as follows:
>
> > "167. … We agree with the claimants that there is a distinction between cases where the challenge is to a decision taken pursuant to secondary legislation, where the ground to bring the claim first arises when the individual or entity with standing to do so is affected by it, and where the challenge is to secondary legislation in the abstract. Cases falling into the first category include *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198 (where the point was not taken on behalf of the Secretary of State, but would have been had it possessed merit), *R v Secretary of State for the Home Department, Ex p Saleem* [2001] 1 WLR 443 and *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2015] AC 49 ; an example of a case falling into the second category is *R (Cukurova Finance International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin) ."
>
> 63. It is convenient to refer to those two categories, as specified in *DSD*, as "the person specific category" and "the abstract category". There is no binding authority, at the level of the Court of Appeal or above, approving or disapproving the distinction made between those two categories in *DSD*."

119. The parties also agreed that the present case falls within the person-specific category, with the result that the grounds to make the claim first arose when the claimant was first affected by them. The claimant contended that that was on 8 September 2020, when his parents and siblings made their applications for leave to enter. The Secretary of State contended that it was on 9 November 2018, when the claimant was granted refugee status. That, however, was a contention which the Secretary of State

had made in the summary grounds of resistance, but then did not pursue at the hearing before Cotter J at which permission to apply for judicial review was granted. Accordingly, it does not seem to me that it should be open to the Secretary of State to raise that contention now. The Secretary of State did not raise any other objection to the reformulation of the claimant's case as set out in his post-hearing submissions.

(8)(f) What Constitutes the Discharge of a Function?

120. In my judgment, it is essential to the consideration of a claim of this nature to identify what (if any) function was discharged by the Secretary of State. As to that, *MM* and *PRCBC* are authority for the proposition that making Immigration Rules is a function for the purposes of section 55. However, in the present case, that function was originally discharged in 2000, long before section 55 came into force.

121. What the claimant complains about is not the making of a change to the Immigration Rules, but the fact that the Secretary of State has not made, or, rather, has decided not to make, a change to the Immigration Rules of the kind for which he contends. As to that, in my judgment:

(1) the simple fact that the Secretary of State has not made a proposed change to the Immigration Rules does not involve the discharge of a function for the purposes of section 55; and

(2) consequently, the question for consideration in this case is whether the Secretary of State discharges a relevant function when she gives active consideration to the question whether to change the Immigration Rules in a particular way, even if her decision is not to make the proposed change.

(8)(f)(i) ST*,* MA *and* MK

122. I have been assisted in addressing that question by some of the cases cited by the claimant. Having said that, I did not find *ST*, *MA* or *MK* to be helpful, since, insofar as section 55 was relevant in those cases, it seems to me that the relevant function in each case was the determination of issues arising in individual cases, rather than the publication of the guidance to be applied in those cases. Thus, as I understand those decisions:

(1) In relation to the functions being discharged:

(a) *ST* concerned the Secretary of State's function of making decisions to impose or lift conditions of no recourse to public funds, pursuant to section 3(1)(c)(ii) of the Immigration Act 1971.

(b) *MA* concerned the Secretary of State's function of deciding whether or not immigrants are children.

(c) *MK* concerned the Secretary of State's function of determining asylum claims made by children.

(2) The guidance considered in each case (i.e. in *ST*, *"Family Life (As a Partner or Parent), Private Life and Exceptional Circumstances"*; in *MA*, the *"Kent*

Intake Unit Social Worker Guidance"; and, in *MK*, *"Children's asylum claims"*) formed part of the arrangements which the Secretary of State contended that she had made pursuant to section 55(1) of the 2009 Act and to which, pursuant to section 55(3), a person exercising the Secretary of State's function in individual cases had to have regard.

(3) It seems to me that these decisions do not address the question which I have to decide, which is whether the Secretary of State discharges a function for the purposes of section 55 when she considers and decides whether or not to amend the Immigration Rules in a particular way.

(8)(f)(ii) 3Million

123. *3Million* is more helpful. As I have said, it concerned the public sector equality duty, rather than the section 55 duty, but both apply when a function is being discharged or exercised. I do not attach any significance to the difference between the word "discharged" in section 55(1)(a) of the 2009 Act and the word "exercise" in subsection 149(1) of the Equality Act 2020, which provides as follows:

> "A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

124. The claimants in *3Million* contended that the arrangements made for the 2019 European Parliamentary election were unlawful. The Divisional Court dealt with the alleged breach of the public sector equality duty in paragraphs 120 to 135 of its judgment. It did not decide whether there had been a breach of the duty, but instead decided that it would not grant the declaratory relief sought even if there had been such a breach, given, inter alia, that the relevant regulations had been repealed and there would be no more such elections in this country.

125. In paragraph 130 of its judgment, the Divisional Court said as follows:

> "Some examples of the factual and legal issues that the pleadings and the evidence appear to leave unanswered can be readily identified. First, the duty is a duty on the public authority to have due regard to certain matters "in the exercise of its functions". In relation to the making of regulations amending the 2001 Regulations, there is a real issue as to whether the defendant was exercising any functions in that matter after June 2016. If regulations are made, and quite possibly, when the issue of whether to amend regulations or not is being actively considered, a minister may be exercising functions. The minister will need to comply with the public sector equality duty and have due regard to the specified matters in reaching a decision. But the evidence here is that after June 2016, no one was actively considering whether or not any

regulations should be amended because it was thought that the United Kingdom would not participate in the 2019 European Parliamentary elections. It is by no means clear that those circumstances involved the exercise of a function. By way of further example, it is unclear what electoral functions the claimant is asserting that the defendant was exercising when he failed to consider any risks of unlawful discrimination or the consequences in terms of lack of opportunity and fostering good relations."

126. Thus, the Divisional Court considered that it was quite possible that a minister would be discharging a function when he "actively considered" whether to amend regulations.

(8)(f)(iii) Badmus

127. *Badmus* concerned a decision made in 2018 ("the 2018 Review Decision") to leave unchanged the rate of £1 (or, for specified activities, £1.25) per hour for paid activity carried out by detainees in immigration detention. The circumstances in which this decision was made were as follows:

(1) The rate of £1 (or £1.25) per hour had been set in 2008 in a Detention Service Order, DSO 15/2008, and had been retained in 2013 when a new Detention Service Order, DSO 01/2013, was issued.

(2) The Secretary of State commissioned a review of the welfare in detention of vulnerable persons, which resulted in a report published in January 2016. The author of the report recommended, inter alia, that the Home Office reconsider its approach to pay rates for detainees.

(3) In April 2018 the Director of Detention and Escorting Services, Immigration Enforcement, commissioned a review of the rates of pay to detainees in immigration removal centres. This resulted in a report ("the Pay Review Report") which recommended that ministers be invited to choose between four options, which provided for increasing either, both or neither of: (a) the hourly rate of pay; and (b) the weekly allowance (i.e. the maximum pay which could be earned in a week).

(4) Faced with this choice, on 3 May 2018 ministers took the 2018 Review Decision, deciding to leave the hourly rate (and the weekly allowance) unchanged. As a result of the 2018 Review Decision, no change was necessary, and none was made, to DSO 01/2013.

128. The claimants sought judicial review of the Secretary of State's decision to fix the hourly rate at £1 (or £1.25). That decision was described in the claim form as "continuing", but the detailed statement of grounds explained that the decision was taken in DSO 01/2013 and then reviewed and retaken in the 2018 Review Decision. There were six grounds of challenge, one of which was that the Secretary of State had failed to comply with the public sector equality duty when taking the 2018 Review Decision. Following a "rolled-up" hearing at first instance, Murray J dismissed all six grounds, holding that it was arguable that the 2018 Review Decision was amenable to judicial review, but that the claim form was out of time as it was filed more than 3 months after the 2018 Review Decision. (His judgment is cited as *Morita v Secretary*

of State for the Home Department [2019] EWHC 758 (Admin), since it also dealt with a related claim brought by Mr Morita, which he held was a challenge to DSO 01/2013, but not to the 2018 Review Decision.)

129. The fifth of the six grounds of challenge concerned the public sector equality duty, as to which Murray J held that it was not arguable that the Secretary of State had failed to comply with that duty. The claimants did not have permission to challenge that finding before the Court of Appeal and the Court of Appeal did not have to consider what constituted the exercise of a function for the purposes of section 149 of the Equality Act 2010. However, the Court of Appeal said as follows in paragraph 61 of its judgment:

> "Although the judge appears to have been somewhat equivocal about it, we consider that there can be no doubt that the 2018 Review Decision is one which is capable of being judicially reviewed. In relation to the adoption of the £1.00 flat rate, it involved a clear and considered policy choice between four options."

(8)(f)(iv) Adiatu

130. In her most recent written submissions, the Secretary of State drew attention to another case on the public sector equality duty, *R (Adiatu) v HM Treasury* [2021] 2 All E.R. 484, [2020] EWHC 1554 (Admin) (*"Adiatu"*). That case concerned the introduction in March 2020 of the Coronavirus Job Retention Scheme ("the JRS") and the extension of the provision of statutory sick pay ("SSP") to those self-isolating because of coronavirus. Neither the JRS nor SSP was available to what are known as "limb b workers" such as Mr Adiatu, who was a private hire driver for Uber. One of the arguments advanced by Mr Adiatu was that the Treasury failed to comply with the public sector equality duty because it failed to consider other options which would have been more beneficial for women and BAME workers, such as extending SSP and the JRS to all limb b workers.

131. The Treasury contended that Mr Ali's complaint was that the Treasury did not have regard to the equalities consequences of decisions which were not taken, and which were never even in contemplation. The Divisional Court said as follows in paragraphs 242 and 243 of its judgment:

> "242. In our judgment, the Defendant's submission is correct. The "exercise of the [public authority's] functions" for the purposes of s149(1) consists of the implementation of the measures that the public authority decides upon. In the present case, these were the steps that were taken to change the rule relating to SSP, and to introduce the JRS, in order to combat the effects of the coronavirus pandemic. A public authority must have regard to the equalities implications of the steps that it intends to take. It need not have regard to the equalities implications of other steps, which it is not taking, and is not even considering. Otherwise, the PSED would indeed go on ad infinitum. A public authority would not only have to comply with the PSED in relation to the decision which it takes, but also in relation to the infinite spectrum of other decisions which it might have taken instead.

243. The fact that the PSED duty is ongoing does not mean that public authorities have constantly to conduct EIAs in relation to a wide range of other options that they might have adopted instead of the option that the authority did adopt."

132. I note also that the Divisional Court said as follows in paragraph 246 of its judgment:

> "It follows that the Defendant did not act in breach of the PSED because it did not conduct an equalities impact assessment or similar of the effects of the extension of SSP and/or JRS to all limb b workers, or the effects of an increase in the rate of SSP. Section 149 did not impose a requirement to have regard to the equalities consequences of taking these steps, as they were not at any stage in the serious contemplation of the Defendant. By the same token, there was no requirement to have regard to the equalities consequences of not taking those steps. Rather, the question for consideration is whether the Defendant complied with its PSED obligations in relation to the steps which it did take."

(8)(f)(v) Conclusion on what Constitutes the Discharge of a Function

133. It is not disputed that the Secretary of State discharges a function when she makes a change to the Immigration Rules. In order to discharge that function, she has to consider from time to time whether to make any and, if so, what changes to the Immigration Rules. It seems to me that she can properly be described as discharging a function when she actively engages in that consideration. As part of that consideration, she may have to choose between various options, one of which may be to make no change to the Immigration Rules. It seems to me that when she decides to choose one option rather than another, including the option of making no change to the Immigration Rules, she is discharging her function of reviewing the Immigration Rules and considering and deciding whether to change them in one or more ways.

134. However, the decision in *Adiatu* is a salutary reminder that both the public sector equality duty and the duty imposed by section 55 of the 2009 Act have to be kept within sensible bounds. In this context, there are a spectrum of possibilities.

(1) At one end of the spectrum, *Badmus* concerned a relatively formal process, resulting in a decision which was amenable to judicial review, and including a review of existing policy, a report containing a recommendation that consideration be given to changing the policy and "a clear and considered policy choice" between identified options. It seems to me that if the Secretary of State were to take a decision in the immigration, asylum or nationality context similar to the 2018 Review Decision in *Badmus*, she would be discharging a function for the purposes of section 55 of the 2009 Act, even if the decision were to make no change to existing arrangements.

(2) At the other end of the spectrum is the claimant's submission that the Secretary of State was exercising a relevant function when she responded to the pre-action protocol letter. It cannot be the case that the section 55 duty is triggered whenever a claimant sends a letter contending that the Secretary of State should change her policy.

(3) Indeed, once the Secretary of State has decided to adopt one policy rather than another, I do not consider that she is to be treated as, in effect, re-making that decision every time she applies, repeats, defends or declines to change the policy which she has adopted.

135. I do not derive any assistance from the use by the Divisional Court in *3Million* of the words "actively considered", since they were part of an obiter dictum in a judgment, rather than the words of a statute. In particular, while they are apt to describe a decision-making process of the kind seen in *Badmus*, I do not regard them as necessarily extending the scope of the section 55 duty to other situations.

136. On the other hand, the references in paragraphs 242 and 246 of the Divisional Court's judgment to what a public authority was considering, or to what was in the serious contemplation of the Treasury, indicate that the Divisional Court at least envisaged the possibility that the section 55 duty might apply in respect of a policy option which was considered, or seriously contemplated, by a public authority, even if that policy option was not the one eventually chosen. However, as the Divisional Court's judgment makes clear, in such a situation the section 55 duty would only apply in respect of those policy options which were in fact considered by the Secretary of State, and not to the infinite variety of other options which might have been considered.

(8)(g) Did the Secretary of State Discharge a Relevant Function?

137. As I have said, the claimant's primary case was that he wanted to challenge what he called an "ongoing decision" on the part of the Secretary of State that the parents and siblings of refugee children will not be entitled to family reunion under the Immigration Rules on the same basis as the spouses and children of adult refugees. However, I do not accept that analysis of the situation. A decision is an act or event, not an ongoing state of affairs. A decision may be reconsidered and re-taken, but that too is an act or event.

138. The claimant's alternative case is that at some time or times since 2 November 2009 the Secretary of State has taken a positive decision, following active consideration, not to change the Immigration Rules so as to create a route to family reunion for refugee children. (Given what I have said about the timing of the application for judicial review, it does not matter when that decision was taken, provided that it was taken after 2 November 2009, and the material relied on by the claimant all dates from after 2 November 2009.)

139. Looking at the material relied on by the claimant, one can see why the claimant believed this to be the case.

(1) According to the Chief Inspector's 2020 report, there is a team or teams within the Home Office responsible for family reunion policy and a member of one of those teams stated that they aimed to review family reunion policy every 12 months.

(2) There have in recent years been several recommendations to the Secretary of State from parliamentary committees and NGOs, and several attempts by legislation, to change the Immigration Rules to provide a route to family

reunion for child refugees. It would be surprising if their cumulative effect had not been to prompt some consideration within the Home Office of the question whether to make such a change.

(3) Indeed, the wording of the Government's response to the House of Commons Home Affairs Select Committee's report of 27 July 2016 suggested that a positive decision was taken not to make the change to the Immigration Rules recommended by that Committee.

(4) Moreover, the UK EMN Request expressly stated on 27 February 2018 that the government was currently reviewing the policy on refugee family reunion and listening to the concerns from NGOs that the current policy and Immigration Rules were too narrow. The Home Office's response to the Chief Inspector's 2018 report also stated that the Home Office was reviewing the approach to family reunion, including considering the debates on the two private members' bills and continuing constructive discussion with key NGOs.

(5) There was no decision to change the Immigration Rules, so any decision can only have been not to change the Immigration Rules. The response to the Chief Inspector's 2018 report stated that the guidance would be updated once a firm position had been reached, which suggests that a firm position was reached before the Family Reunion Guidance was amended in 2019 or 2020.

140. However, the evidence served after the hearing makes clear that the relevant decision-makers, i.e. the Secretary of State and Home Office ministers, have not given active consideration since 2 November 2009 to the policy option of changing the Immigration Rules so as to create a route to family reunion for refugee children. That evidence is consistent with what is recorded in paragraph 6.17 of the Chief Inspector's 2020, i.e. that, while Home Office staff were considering the issue of child sponsors, "child sponsors was a "ministerial red line"."

141. Accordingly, I conclude that that Secretary of State has not, since the 2009 Act came into force, exercised a relevant function for the purposes of section 55 of the 2009 Act in relation to the option of creating a route to family reunion for refugee children and that, consequently, she has not been obliged to comply with the section 55 duty in relation to that policy option.

(8)(h) Decision on Ground 1

142. In those circumstances, ground 1 is dismissed.

(9) Ground 2: Discrimination

(9)(a) The Legal Framework

143. Subsection 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority, such as the Secretary of State, to act in a way which is incompatible with a Convention right. The relevant Convention rights are the rights set out in Articles 8 and 14 of the European Convention on Human Rights. Article 8(1) provides, inter alia, that everyone has the right to respect for his private and family life. Article 14 provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

144. In paragraph 136 of her judgment in *R (DA) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289, Baroness Hale said as follows:

> "In deciding complaints under article 14, four questions arise: (i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights? (ii) Does the ground upon which the complainants have been treated differently from others constitute a "status"? (iii) Have they been treated differently from other people not sharing that status who are similarly situated or, alternatively, have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs? (iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised (see *Stec v United Kingdom* (2006) 43 EHRR 47 , para 51)?"

145. In the present case, it was not in dispute that:

(1) the relevant Immigration Rules fall within the ambit of Article 8; and

(2) being a child refugee is an "other status" for the purposes of Article 14,

but the parties disagreed on the third and fourth questions posed by Baroness Hale.

146. In relation to those questions, in paragraph 37 of his judgment in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, Lord Reed said as follows:

> "The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61 ("*Carson*"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) "The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14."
>
> (2) "Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly

similar, situations."

(3) "Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

(4) "The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.""

147. I will deal first with the third question, i.e. whether there is differential treatment of child and adult refugees.

(9)(b) Differential Treatment: The Parties' Submissions

148. The claimant submitted that:

(1) child refugees and adult refugees are "similarly situated" in terms of the importance to them of reunion with their immediate family; but

(2) the Immigration Rules treat child refugees differently from adult refugees because they make it easy for adult refugees to reunite with their immediate family, but extremely difficult for refugee children to reunite with theirs.

149. The Secretary of State submitted that there was no relevant difference in treatment. In particular, she submitted that there was no relevant difference in treatment between those who, like the claimant, were just short of their 18th birthday when their parents and siblings applied for leave to enter, and young adult refugees who wished to bring their parents and siblings to the United Kingdom. The Secretary of State also submitted that there was a material difference between the position of a child refugee seeking to sponsor parents and/or siblings and an adult refugee seeking to sponsor a partner and/or children.

150. I asked Mr Husain about two issues:

(1) Whether the relevant Immigration Rules could be said to treat a child refugee in the same way as an adult refugee, in that neither of them can sponsor their parents or siblings in an application for leave to enter the United Kingdom.

(2) Whether it could be said that an Immigration Rule such as the claimant contended for, which would allow the parent and/or siblings of a child refugee to enter the United Kingdom, would discriminate against adult refugees, who would not be in the same position.

151. In response, he submitted that what mattered was the ability of a refugee to sponsor the entry into the United Kingdom of members of the "nuclear family unit" and an adult's nuclear family consisted of his or her partner and children, whereas a child's nuclear family consisted of his or her parents and siblings. He noted that paragraph

352D(iii) of the Immigration Rules contains reference to an "independent family unit". This was also the context in which he relied on the reference to the "nuclear family" in the UNHCR Guidelines. He also referred to paragraph 26 of Ryder LJ's judgment in *Uddin v Secretary of State for the Home Department* [2020] 1 WLR 1562 ("*Uddin*"), which was in the following terms:

> "*Kugathas* [2003] EWCA Civ 31 describes the requirements for proving family life between adults in the context of immigration control. At para 14, Sedley LJ cited with approval the report of the European Commission of Human Rights in *S and S v United Kingdom* 40 DR 196, para 198:
>
> > "Generally, the protection of family life under article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults … would not necessarily acquire the protection of article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.""

152. That case was concerned with the question whether an 18 year old had a family life with his foster parents, with whom he had lived for 5 years. I note that Ryder LJ also dealt with the effect on that question of the fact that the claimant was over 18. He said as follows in paragraphs 35 and 36 of his judgment:

> "35. The next question is whether the attainment of majority, that is to say the point at which a young person reaches his or her 18th birthday, has any relevant effect upon the existence of a family life. That question is settled. In *Singh v Secretary of State for the Home Department* [2016] Imm AR 1, Sir Stanley Burnton, with whom the rest of the court agreed, held at para 24 that:
>
> > "A young adult living with his parents or siblings will normally have a family life to be respected under article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of article 8."
>
> 36. The existence of family life after a young person has achieved his or her majority is a question of fact. There is no presumption, either positive or negative, for the purposes of article 8. Continued cohabitation will be a highly material factor to be taken into account and while not determinative, a young adult still cohabiting with a family beyond the attainment of majority is likely to be indicative of the continued bonds of effective, real or committed support that underpin a family life."

(9)(c) Differential Treatment: Decision

153. In my judgment, there is a difference of treatment between child and adult refugees in the relevant Immigration Rules, but it is not the difference complained of by the claimant. The effect of paragraph 277 of the Immigration Rules is that the spouse or

partner of a child refugee cannot be granted leave to enter the United Kingdom in circumstances where the spouse or partner of an adult refugee would be grated leave to enter. This is a difference of treatment on the ground of age.

154. I do not accept, however, that the matters complained of in this case constitute a difference of treatment for the purposes of Article 14. The relevant Immigration Rules treat child and adult refugees the same: neither child nor adult refugees are permitted by the relevant Immigration Rules to sponsor applications for leave to enter by their parents or siblings.

155. In those circumstances, in my judgment, the claimant has, in effect, to rely on the alternative formulation of Baroness Hale's third question, namely, "have [child refugees] been treated in the same way as [adult refugees] whose situation is relevantly different from theirs?" I note that that is not how Mr Husain put the claimant's case. On the contrary, as I have said, his contention was that child refugees and adult refugees are "similarly situated" in terms of the importance to them of reunion with their immediate family. However, it seems to me that Mr Husain was, in effect, contending that child refugees are in a relevantly different situation from adult refugees insofar as he submitted that the "nuclear family" of an adult refugee consists of the refugee's partner and minor children, whereas the "nuclear family" of a child refugee consists of the refugee's parents and siblings.

156. However, I do not find this to be a helpful way of looking at the matter. The concept of "nuclear family" is not as clear-cut as Mr Husain suggested. For instance, some adult refugees will be individuals who are 18 or more years old and who may have been living with their parents as dependent relatives before they left their country of habitual residence. For these adult refugees, their nuclear family may well consist of their parents and siblings, so that their situation is substantially similar to that of many child refugees. I note in this context that:

(1) The UNHCR Guidelines state that "it is UNHCR policy to promote the reunification of parents with at least those dependent, unmarried children, regardless of age, who were living with the parents in the country of origin." Thus, the UNHCR regards dependent children as part of the nuclear family whether they are under or over 18. Moreover, the UNHCR's view, as set out in the UNHCR Guidelines, is that the principle of family unity requires the reunification of adult refugees with their parents, if their parents are dependent on them.

(2) As Ryder LJ said in *Uddin*, there is no presumption, positive or negative, as to the continuation of family life after a person turns 18.

(3) Various proposals have been made under which:

(a) adult as well as child refugees would be able to sponsor the entry of their parents and siblings into the United Kingdom: see the amendment proposed by Stuart C McDonald MP to the Immigration and Social Security Co-ordination Bill and the demands of the Families Together coalition; and

(b) at least some unmarried adult children would be treated as part of an adult refugee's "nuclear family": see the three private members' bills and the proposed amendment to which I have referred and the demands of the Families Together coalition.

157. Accordingly, I dismiss ground 2.

(10) Ground 3: Irrationality

(10)(a) Ground 3: Context

158. By ground 3, the claimant contends that the Secretary of State's position is irrational. The claimant submitted that "This is the case both when the position is considered in its own terms and, and by particular reference to the unjustified discriminatory treatment it entails …": see paragraph 113, and see also paragraph 113A, of the amended statement of facts and grounds. However, this formulation involves an element of elision between grounds 2 and 3. Having dismissed ground 2, I consider ground 3 as a free-standing ground.

159. Moreover, although the parties referred, in the context of ground 2, to a number of authorities on the question of the standard of review to be applied when determining whether a rule or decision which interfered with rights under Article 8 and/or 14 ECHR was justified, ground 3 is an allegation that the Secretary of State's position was irrational and falls to be determined as such.

160. As I have already noted, it became apparent at the hearing that the claimant's real challenge is to the relevant Immigration Rules. Challenges to the Immigration Rules are well known, but the present situation is an unusual one:

(1) The relevant Immigration Rules were introduced in 2000, but there was no evidence before me either:

(a) as to the process followed (including any evidence taken into account) by the Secretary of State when the decision was made to change the Immigration Rules in 2000; or

(b) as to matters which the claimant contended should have been taken into account when that decision was made in 2000: the evidence relied on by the claimant was all much more recent.

(2) Nevertheless, there was no dispute as to the reason why the Immigration Rules do not contain a route to family reunion for child refugees. As appears from some of the documents which I have cited, the justification which has consistently been offered for this feature of the Immigration Rules is as follows (quoting from the Home Office response to the Chief Inspector's 2020 Report):

(a) " … allowing children to sponsor parents would risk creating incentives for more children to be encouraged, or even forced, to leave their family and attempt hazardous journeys to the UK."

(b) "This would play into the hands of criminal gangs, undermining [the UK's] safeguarding responsibilities."

(c) "It is important that those who need international protection should claim asylum in the first safe country they reach – that is the fastest route to safety."

(3) Moreover, that is the only justification which has been offered. As Mr Husain stressed, the Secretary of State has not sought to justify this feature of the Immigration Rules on economic grounds.

(4) It was not suggested by either party that the Secretary of State had given active consideration before 2 November 2009 to changing the Immigration Rules so as to create a route to family reunion for child refugees.

(5) I have dealt in the context of ground 1 with the claimant's contention that the Secretary of State has given active consideration since 2 November 2009 to changing the Immigration Rules so as to create a route to family reunion for child refugees. I have decided that she has not done so.

161. That is the context in which I have to consider the submissions made about ground 3.

(10)(b) Irrationality: The Claimant's Case

162. The claimant contended that the Immigration Rules were irrational insofar as they did not provide a route to family reunion for refugee children. Mr Husain, on behalf of the claimant, did not submit that the matters relied on as justifying this feature of the Immigration Rules were either irrelevant or incapable in principle of justifying this feature of the Immigration Rules. Rather, he relied on the evidential position, submitting that the Immigration Rules were irrational because:

(1) On the one hand, there is evidence that, in general, it is in the best interests of unaccompanied refugee children: (a) to be reunited with their families; and (b) to have a straightforward path to that result. I have already noted that these propositions were not disputed. In addition, Mr Husain relied both on the evidence of the effect on the claimant's mental health of being separated from his parents and on many reports by NGOs and others speaking of the harmful effects on unaccompanied child refugees generally of separation from their families.

(2) On the other hand, Mr Husain submitted that there was no evidence that making the change which the claimant seeks would have the effects feared by the Secretary of State.

163. As to this latter point:

(1) In paragraph 41 of his judgment in *AT and AHI v Entry Clearance Officer of Abu Dhabi* [2016] UKUT 00227 (IAC) McCloskey J noted that there was no evidence in that case (which was an appeal against the refusal of entry clearance to the mother and brother of an unaccompanied child refugee)

underlying the claim that the public interest in the safeguarding of children was engaged by the decisions under appeal.

(2) The only evidence relied on by the Secretary of State in these proceedings was to be found in the responses to the Belgian EMN Request. Mr Husain submitted that they did not support the Secretary of State's position, and further submitted that the responses to the UK EMN Request undermined it.

(3) Mr Husain relied on reports by the UNHCR and others which have considered, inter alia, the reasons why unaccompanied child refugees leave their countries of origin. He submitted that these reports did not support, and indeed undermined, the Secretary of State's position.

(4) I have already referred to: (a) the Chief Inspector's 2020 report, in paragraph 4.4 of which he recommended that the Home Office clarify its position, with supporting evidence, in relation, inter alia, to child sponsors; (b) the Home Office response to that report; and (c) the Chief Inspector's comment that that response "offers no supporting evidence to show that it has either monitored or evaluated the impact of its policies."

(10)(c) Irrationality: The Secretary of State's Case

164. The Secretary of State denied that the relevant Immigration Rules were irrational, relying on the justification to which I have referred. As to the evidential position:

(1) In her summary grounds of defence, the Secretary of State asserted that the responses to the Belgian EMN Request supported her position. She also said that, if permission to apply for judicial review were granted, she would consider serving evidence. In the event, however, she did not serve any evidence before the hearing.

(2) In her detailed grounds of defence, the Secretary of State again referred to the responses to the Belgian EMN request. She also said as follows:

> "The SSHD has explained on numerous occasions, including in Parliament, why she has adopted the policy she has. Plainly, this is not a matter capable of empirical proof; rather, it is a matter of judgment."

(3) At the hearing, Miss Giovanetti placed more reliance on this latter point than on the responses to the Belgian EMN Request.

(4) Since the Secretary of State has, in her written submissions and in her evidence filed after the hearing, adopted the position, which I have accepted, that on no occasion since 2 November 2009 has she given active consideration to changing the Immigration Rules in order to provide a route to family reunion for child refugees, it appears to follow that in fact she has not considered the responses to the Belgian EMN Request, nor any other evidence, as part of an exercise which she has not conducted.

(10)(d) The Responses to the EMN Requests

165. In the light of the observation which I have just made, it may be that the responses to the Belgian EMN Request are of limited, if any, significance in the present case. However, given the significant role which the Belgian and UK EMN Requests played in the hearing, it is appropriate to say something about them.

166. The Belgian EMN Request was solely concerned with cases where an unaccompanied child applied for refugee status in one EU country, and that country was then asked (mostly by the Greek authorities) to take over the asylum applications made by the child's parents or other family members. That is different in at least two respects from the situation envisaged by the Secretary of State:

(1) The Belgian EMN Request only applied to cases where the family had already reached a member state of the EU. It would not have applied, therefore, to the situation of the claimant and his family, who were in Ethiopia when they made their applications. The Secretary of State's concern was not limited to children whose parents were in a member state of the EU.

(2) The Belgian EMN Request concerned applications for asylum. It did not concern the situation of unaccompanied children who had been granted refugee status.

167. It follows that what the Belgian authorities described as the "anchor child phenomenon" was not the same as the phenomenon of "anchor children" which was referred to in the Secretary of State's justifications for her policy. The responses to the Belgian EMN Request from Austria, Belgium, Cyprus, Finland, Germany, the Netherlands, Sweden and Norway acknowledged the existence of the "anchor child phenomenon" as described by the Belgian authorities in their states, with some countries seeing an increase and the Finnish response stating that Finnish policy aimed to prevent and discourage the use of children for this purpose.

168. The UK EMN Request asked whether states allowed children recognised as refugees to sponsor relatives for the purposes of family reunion and, if so, when they started allowing child sponsors, what impact this had and how many family reunion visas they had granted in the last 5 years where the sponsor was a child. As to this:

(1) Most states' responses said that they allowed child refugees to sponsor family reunion. That is consistent with the Family Reunification Directive.

(2) Most states' responses said that they could not provide figures. Some (Belgium, Italy, Latvia, Luxembourg, Malta and Poland) indicated that the figures were low, although: Belgium and Norway said that the figures were increasing; Finland described a sharp increase, followed by a reduction after legislative changes were made in 2010; and Sweden said that 3,683 individuals were granted a residence permit in 2017 for family reunification in Sweden where the sponsor was a child.

169. All in all, the responses to the Belgian and UK EMN Requests appear to be consistent with the following statements made by the Home Office:

(1) The statement which the Chief Inspector reported (in paragraph 6.16 of his 2020 Report) the Home Office as making about the responses to the UK EMN

Request, namely:

> "it was difficult to disaggregate the relative impact of varying pull factors and it was difficult to directly compare other EU country policies on family reunion – other countries vary in their criteria and those who are eligible for refugee family reunion."

(2) The statement in paragraph 4.4 of the Home Office response to the Chief Inspector's 2020 Report that:

> "… There is a need to better understand why people choose to travel to the UK after reaching a safe country."

(3) The statement in paragraph 5.01 of the Secretary of State's response to the pre-action protocol letter that:

> "… There is a need to better understand why large numbers of unaccompanied minors make often dangerous journeys to the UK, when they should be claiming asylum in the first safe country they reach."

(10)(e) Decision on Ground 3

170. In addressing the claim that the relevant Immigration Rules are irrational insofar as they do not provide a route to family reunion for child refugees, I note, in particular, that:

(1) The United Kingdom is under no treaty obligation to provide such a route.

(2) Nor was the Secretary of State under a statutory obligation to do so.

(3) As the present case illustrates, the Immigration Rules do not totally preclude family reunion for child refugees. Rather, they do not make it as straightforward as it might be.

(4) It is not alleged that the matters relied on as justifying this feature of the Immigration Rules were either irrelevant or incapable in principle of justifying this feature of the Immigration Rules.

(5) Rather, the claimant's contention is that the relevant evidence is so overwhelming that no rational Secretary of State could reach any different conclusion than that contended for by the claimant on the substantive issue, which concerns what the Immigration Rules should provide as to who should be granted leave to enter or remain in the United Kingdom.

(6) Before considering such a contention, the court would normally expect to receive evidence as to the Secretary of State's assessment of the relevant evidence. It is not for the court to decide the substantive issue. The court's function is limited to reviewing the lawfulness of decisions made by the Secretary of State. As to that:

(a) Neither party engaged with the decision taken in 2000 to change the Immigration Rules so as to include the rules which are impugned in this case. It would not be open to me to conclude that that decision was irrational.

(b) Nor was it suggested that any relevant decision was taken between 2000 and 2 November 2009.

(c) As for the period since 2 November 2009, I have found that the Secretary of State did not give active consideration in that period to the possibility of changing the Immigration Rules so as to provide a route to family reunion for child refugees.

171. In his written submissions after the hearing, the claimant submitted, inter alia, that it was not open to the Secretary of State to insulate herself from, or to circumvent, her duty under section 55 of the 2009 Act by simply refusing to amend the relevant Immigration Rules. However, I have not heard submissions from both parties on this issue, which would arguably require the claimant to apply for permission to amend his grounds so as to challenge the Secretary of State's decision(s) not to, and/or refusal and/or failure to, give active consideration to the possibility of changing the Immigration Rules so as to provide a route to family reunion for child refugees.

172. In those circumstances, and bearing in mind the way in which both parties' cases developed during and after the hearing, and in particular the fact that the Secretary of State's evidence was only produced some time after the hearing, I have concluded that the appropriate course to take is to adjourn a decision on ground 3 in order to give the claimant the opportunity, if so advised in the light of the developments since the hearing and/or the contents of this judgment, to seek to pursue a challenge of the kind identified in the preceding paragraph. Naturally, I express no opinion on the merits of any such challenge.

(11) Summary

173. In summary, for the reasons which I have given, I dismiss grounds 1 and 2 of this application for judicial review and I adjourn consideration of ground 3 on the basis which I have indicated.

174. Finally, I express my gratitude to all solicitors and counsel involved in this case for their considerable assistance.